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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1943

ON APPEAL FROM THE SUPREME COURT OF INDIANA

INTERNATIONAL HARVESTER COMPANY AND  
INTERNATIONAL HARVESTER COMPANY OF  
AMERICA,

*Appellants,*

v.

DEPARTMENT OF TREASURY OF THE STATE OF } No. 355  
INDIANA, M. CLIFFORD TOWNSEND, JOSEPH  
M. ROBERTSON, AND FRANK G. THOMPSON,  
AS MEMBERS OF AND CONSTITUTING THE  
BOARD OF DEPARTMENT OF TREASURY,

*Appellees.*

**APPELLANTS' REPLY BRIEF**

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JOSEPH J. DANIELS and  
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## SUBJECT INDEX

	<i>Page</i>
No difference between resident and non-resident so far as interstate commerce is concerned.....	1
The issue involved as to all three Classes C, D and E is that of an unconstitutional burden on transactions in interstate commerce.....	4
Discussion of the assertion that "Even interstate business must pay its way".....	5
Discussion and refutation of Appellees' argument respecting Class D sales.....	7
Class C transactions.....	13
Class E transactions.....	20
The tax on Classes C, D and E would deny due process of law under the Fourteenth Amendment.....	22
Conclusion .....	23

## TABLE OF CASES

	<i>Pages</i>
A. G. Spalding Bros. v. Edwards, 262 U. S. 66....	11
Commissioner of Corporations v. Ford Motor Co., 308 Mass. 558, 33 N. E. (2d) 318.....	10
Department of Treasury v. Allied Mills, Inc., 220 Ind. 340, aff'd 318 U. S. 740, 801.....	2
Department of Treasury v. Wood Preserving Corp., 313 U. S. 62.....	8, 9, 10
Gibbons v. Ogden, 9 Wheaton 1.....	13
Graybar Electric Co. v. Curry, 238 Ala. 116, 189 Southern 186, aff'd 308 U. S. 513.....	21
Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434.....	5, 15, 16, 22
Hans Rees' Sons v. North Carolina, 283 U. S. 123 .....	22
J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307....	2, 4, 15, 22
McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33.....	11, 20
Nelson v. Sears, Roebuck and Co., 312 U. S. 359	16
Rearick v. Pennsylvania, 203 U. S. 507.....	2
Sonneborn Bros. v. Cureton, 262 U. S. 506.....	21
Superior Oil Co. v. Mississippi, 280 U. S. 390....	11
Trotwood Trailers, Inc. v. Evatt, 51 N. E. (2d) 645 (Ohio) .....	10

### *Treatises*

The Federalist, Lodge Election, 1902.....	24
The Records of the Federal Convention of 1787, Max Farrand.....	23, 24
Robert C. Brown, "Some Legal Aspects of State Sales and Use Taxes," 18 Indiana Law Journal 77.....	14

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**APPELLANTS' REPLY BRIEF**

Appellees' brief is based on the assumption that a different rule applies to the taxation of gross receipts from interstate commerce received by a resident of Indiana, or by an Indiana corporation, from the rule applied to the taxation of gross receipts from interstate commerce received by a non-resident or a foreign corporation.

On page 13 of Appellees' brief, they state: "Since the tax against residents upon their Gross income from

all sources (including interstate commerce) differs materially from the tax against non-residents upon their intrastate activities alone, the cases involving the former (*J. D. Adams Manufacturing Co. v. Storen* (1937), 304 U. S. 307; *Department of Treasury v. Allied Mills* (1942), 220 Ind. 340, aff'd 318 U. S. 740, 801) are inapplicable to the commerce clause questions presented in this case." The meaning of this statement is not clear, but we submit that in any event the decisions of this Court make it abundantly clear that only such gross receipts as arise from Indiana sources are subject to taxation by Indiana when received by a non-resident or by a foreign corporation, and that even such gross receipts are *not* subject to tax if taxing them imposes a burden on interstate commerce.

In other words, we understand that so far as interstate commerce is concerned, this Court has granted the same protection to a foreign corporation as to a domestic corporation, to a non-resident as to a resident.

If the tax as laid is a burden on interstate commerce, it will be held invalid whether the taxpayer is a non-resident or a resident, a foreign corporation or a domestic corporation.

" 'Commerce among the several States' is a practical conception, not drawn from the 'witty diversities' (Yelv., 33) of the law of sales," Mr. Justice Holmes observed in *Rearick v. Pennsylvania*, 203 U. S. 507, 512. The question of what is interstate commerce does not depend on the simple test of where title passed. It does not depend on a nice balancing and weighing of the intrastate activities and the out of state activities, as Appellees seem to imply by their statement on page 13 of their brief that "Indiana does tax businesses conducted in Indiana by non-residents

even though some of the activities incidental to such business are carried on in other states."

In every interstate commerce transaction there must inevitably be some activities carried on in at least two states. It is impossible to carry out an interstate commerce transaction in a vacuum. The question in the case at bar, therefore, is not whether there were some intrastate activities in Indiana in any of the classes of sales here involved, but, always bearing in mind that interstate commerce is a practical conception, whether looking at the transaction as a whole it is one in interstate commerce.

As a general proposition relating to the power of the sovereign to determine whether it will exact revenue from the whole bundle of rights constituting ownership or only from some of the sticks composing the bundle, the statement on page 15 of appellee's brief that "there is no distinction between a tax on property, the sum of all of the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements", is of course correct, but the use of the words "In relation to the commerce clause", at the beginning of the statement, does not add anything to the general proposition and serves merely to becloud its meaning. If the commerce clause is not involved, the state may elect to tax the whole bundle of rights or merely some of the sticks composing the bundle. But the commerce clause cuts across the taxing power of the states and inhibits them from laying any tax, whether on the whole bundle of rights or on some of the sticks composing the bundle, if such tax amounts to a burden on interstate transactions. It is true that the limitation laid by the commerce clause comes into play more frequently in cases where a state has attempted to tax only some

of the constituent elements of ownership, and not the entire bundle of rights. That is because the states, in their efforts to avoid the commerce clause, attempt to do so by an indirect route which they hope will seem innocuous rather than by an obvious frontal attack. But the protection afforded by the commerce clause is not affected by the method which the state adopts in its effort to avoid it.

On page 17 of Appellees' brief, to our mind in contradiction with the statements made on page 13 above quoted, it is stated that in the *Adams* case "by agreement of the parties it was understood that interstate commerce was involved, while the contention in this case is not the application of the Gross Income Tax law to interstate commerce, but, first, whether the factual situation indicates that the transactions in question are actually in interstate commerce, or of such a character that a non-discriminatory state tax may be imposed."

In our view this statement on page 17 of Appellees' brief and the statement quoted above from page 13 of their brief are entirely contradictory. The quotation from page 13 states that the *Adams* case is "inapplicable to the commerce clause questions presented in this case", and the quotation from page 17 says that the question involved in this case is not, as in the *Adams* case, the application of the Indiana Gross Income Tax to interstate commerce.

We submit, first, that this Court in the *Adams* case considered solely the question of whether the tax as laid in the *Adams* case was a burden on interstate commerce. We submit, secondly, that in the case at bar Appellant from first to last has asserted that the tax as laid on Classes C, D and E is a burden on interstate commerce in violation of the commerce clause. In our original brief

we cited decisions of this Court to the effect that the transactions involved in Classes C, D and E are transactions in interstate commerce. We contend that unless they are given the protection of the commerce clause, the gross receipts from such transactions are inevitably thrown open to the threat of multiple taxation.

At the top of page 19 of Appellees' brief it is stated: "Because Appellants' business organization assigns territories without regard to state boundaries, they ask to be relieved of all payment for these non-discriminating charges levied with mathematical equality upon intrastate commerce and interstate commerce alike." This comment is made in the discussion of the tax on Class D sales. Obviously it might as well be made as to all three classes.

Evidently Appellees have in mind the statement frequently made that "Even interstate business must pay its way." We submit that this statement means simply that interstate business must pay the ordinary taxes on its property in the taxing jurisdiction, even though that property is wholly used in interstate commerce, and that it must pay local excise or privilege taxes for the privilege of exercising a local activity. It has never been held that interstate business must pay its way by paying without apportionment gross receipts taxes on interstate commerce transactions. Indeed, in the case of *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, this Court said on page 438 that it has been recognized that "even interstate business must pay its way by bearing its share of local tax burdens," but went on to say that it "was enough for present purposes that under the commerce clause, in the absence of Congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax

measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state."

The Record in this case shows that the International Harvester Company throughout the years in question had factories in Indiana at Fort Wayne and Richmond, and branch houses at Fort Wayne, Indianapolis, Evansville and Terre Haute. The Record further shows that in 1938 it established and now owns and operates a factory manufacturing motors at Indianapolis. (R. 25.) It is evident, therefore, that Appellant pays heavy real estate and personal property taxes in Indiana.

Moreover, the Record shows that the International Harvester Company has paid for the years 1935 and 1936 Indiana Gross Income Taxes under the very statute involved in this case, amounting to \$71,262.71, which are in no way involved in this appeal. The amount involved in this appeal is the additional sum of \$4,031.98. (R. 41, 49-51.)\*

We submit, therefore, that the International Harvester Company is not asking in this case "to be relieved of all payment for these non-discriminating charges." It is asking only to be relieved of certain Indiana Gross Income Taxes which definitely impose a burden on interstate commerce.

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\* For 1935 and 1936 the Appellant paid total Indiana Gross Income Taxes of \$86,584.93. The amount for which recovery was asked in the Complaint in the case at bar was \$16,270.07. Of this amount, the Indiana Gross Income Tax Division conceded, or the Indiana Supreme Court held, that the Appellant was not taxable with respect to taxes amounting to \$11,290.24. The Appellant in the Stipulation of Facts withdrew its contentions with respect to taxes amounting to \$947.85. The amount now involved in this appeal is \$4,031.98. The amount of Gross Income Taxes paid by the Appellant and in no way involved in the appeal is therefore \$71,262.71.

### **Discussion and Refutation of Appellees' Argument Respecting Class D Sales**

Appellees state (p. 15, Appellees' brief) that all the activities of the seller, including the manufacture of the goods, occurred in Indiana, except the solicitation of the order, and that all of the activities of the buyer except the acceptance of delivery occurred outside of Indiana. Again they state that "the goods had never been without the State of Indiana, where they were manufactured."

This last assumption is not supported by any evidence in the Record.

Class D sales are sales by branches of the International Harvester Company in Indiana to dealers and consumers residing outside of Indiana, where the buyers came to Indiana and took delivery of the goods themselves. (R. 44.) Delivery in Class D may have been either at the branch in Evansville, Terre Haute or Fort Wayne, the three Indiana branches which have outside territory, or, on direction of those branches, at the factory at Fort Wayne or Richmond. But there is nothing in the Record to the effect that all the goods in Class D were of Indiana manufacture. They may well have been (and though the Record is silent on the subject, many of them inevitably were, since the branches carried a full line of Appellants' products) goods manufactured at the factories of the International Harvester Company in Illinois, Ohio, New York, Wisconsin, Louisiana, or Tennessee, shipped to the branches at Terre Haute, Evansville or Fort Wayne and called for there by the buyers living in Ohio, Kentucky or Illinois.

The situation is that the dealers in the territory of the Terre Haute, Fort Wayne or Evansville branches had

been dealing habitually for years with their branch and that the consumers living in the territory handled by those branches had likewise been dealing habitually for years either directly with the branch or with the dealer who in turn dealt with the branch. The annual contract with the dealer and the retail order contract with the consumer called for shipment from the factory, transfer house or branch house to the buyer. (R. 34, 34A, 38.) It is obvious that the dealer came to the branch at Terre Haute, Fort Wayne or Evansville or went to the factory at Richmond or Fort Wayne and got his goods himself, or the consumer did likewise, either because he would save delivery expense by making his own delivery, or because he would save time by going and getting the goods himself and not waiting for freight or truck delivery from the branch or factory.

The situation, therefore, is very different from that in the case of *Department of Treasury, et al. v. Wood Preserving Corporation*, 313 U. S. 62, on which Appellees so strongly rely.

In the *Wood Preserving* case it appeared that the Wood Preserving Corporation bought railroad ties in Indiana from Indiana producers. The ties were inspected in Indiana by the Baltimore & Ohio Railroad Company, and the Wood Preserving Corporation paid the Indiana producers for the ties accepted by the Baltimore & Ohio Railroad Company. Then bills of lading were made out by the Wood Preserving Corporation as consignor to the Railroad's Chief Engineer of Maintenance of Way at Finney, Ohio, as consignee, and the ties were sent to Finney, Ohio, for treatment at a treating plant which belonged to a subsidiary of the Wood Preserving Corporation.

The right of way of the Baltimore & Ohio Railroad extended through many states, including the state of Indiana. When it purchased the ties in Indiana it could use them any place along its right of way. Moreover, they were unfinished goods which required treatment before they could be used. We submit that the purchase was similar to the purchase of coal or iron ore by a steel company. Iron ore purchased in Minnesota by a steel company may be sent to one of its mills in any one of half a dozen states, or may be retained in the state of purchase, just as the railroad ties in the Wood Preserving case might finally be used on the right of way in Indiana.

In the *Wood Preserving* case, the buyer was a railroad having its tracks and doing business in Indiana; the railroad was an Indiana buyer; Indiana was the buyer's state, the seller's state, and the state where delivery occurred. In the case at bar, in Class D sales, Indiana is *not* the buyer's state and the destination of the goods is not in Indiana.

Again, in the *Wood Preserving* case the transaction between buyer and seller ended with delivery to the buyer. But in the case of our Class D purchases where both the dealer and consumer were dealing with the branch with

which they had dealt for years, there was only one destination at which any dealer of the International Harvester Company had any use for the goods, and there was only one destination at which a consumer in Class D would have any use for the goods. In each case the one destination was the home town of the dealer or consumer outside of Indiana.

Another controlling and vital distinction, we submit, between the *Wood Preserving* case and the case at bar is that there was no showing in the *Wood Preserving* case of a threat of double taxation. The state of the buyer and the seller, and the state of delivery, were one and the same, and there was no showing that any other state could assert a right to tax gross receipts from the transaction.

But in Class D sales the state of the buyer is not Indiana, and in this very case the Indiana Supreme Court has said that this Court has held that the state of the buyer, which in Class D is not Indiana, can tax. In this very case the Indiana Supreme Court has held that the state of delivery, which is Indiana, can tax. Therefore, Class D sales directly raise the question of double taxation of the same gross receipts from an interstate commerce transaction. The *Wood Preserving* case did not raise that question.

The Ohio case of *Trotwood Trailers, Inc. v. Evatt*, 51 N. E. (2nd) 645, cited by Appellees on page 16 of their brief, is we submit directly contrary to the case of *Commissioner of Corporations v. Ford Motor Company*, 308 Mass. 558, 33 N. E. (2nd) 318, cited in our original brief, and is ably answered by the dissenting opinion of Judge Turner in the *Trotwood* case itself.

Appellees also refer to the case of *Superior Oil Company v. Mississippi*, 280 U. S. 390. But in that case, which Mr. Justice Holmes (who spoke for the Court) admitted "is near the line," (p. 395) he said that "there was nothing that in any way committed it [the purchaser] to sending the oil to Louisiana except its own wishes." He added on page 396 that the buyer's "journey to Louisiana was accidental so far as the appellant was concerned."

He also said that a distinction had been taken between sales "made with a view to a certain result and those made simply with the indifferent knowledge that the buyer contemplates that result."

In the case of our Class D sales the purchaser, whether he were a dealer or a consumer, had no use whatever for the goods except in his own home town. Certainly the sale was made "with a view to a certain result," and not, in Mr. Justice Holmes' words, "with the indifferent knowledge that the buyer contemplates that result." (p. 395.) The buyer's journey, to quote Justice Holmes again, was not "accidental" so far as International Harvester Company was concerned. Applying the words of the decision in *McGoldrick v. Berwind-White Coal Mining Company*, *supra*, the merchandise in Class D had not been "brought to its journey's end," (p. 49) as it had in the Berwind-White case. To adopt the language of this Court in *A. G. Spalding Bros. v. Edwards*, 262 U. S. 66, 70, there was not "the slightest probability of any such change and it did not occur," namely, a change in the intention of the buyer to remove the goods from the state.

It is submitted that a retail dealer, having an established place of business in a certain town, would not arbitrarily take the goods to another town, and obviously a consumer

has only one place to take the goods, and that is his own home town.

Moreover, the Record (R. 34) shows that 67.6% of the sales involved in this case were on conditional sale contracts, and it is manifest that a purchaser under a conditional sale contract cannot remove the goods from jurisdiction to jurisdiction at his own pleasure.

We have shown that the State of Illinois has already asserted an intention to tax, under the Illinois Retailers Occupation Tax, the very same sales as were made in Class D. In other words, Illinois asserts that if a seller with an office in Indiana habitually sends sales representatives to Illinois to solicit sales, that seller is a person engaged in the business of a retailer in Illinois and a sale by that seller to the Illinois buyer will be subject to the Illinois Retailers Occupation Tax, even though the purchaser gets delivery of the goods himself in Indiana and brings them to Illinois.

Appellees state in their brief that we have shown only one concrete example of such a possibility of multiple taxation (page 18, Appellees' brief). It may safely be predicted, however, in view of the well-known imitative tendencies of legislatures in the United States, that if this Court should hold that the Indiana Gross Income Tax can be applied to Class D transactions without clearly prohibiting taxation by the state of the buyer on the same gross receipts, there will very likely be 47 states in a few years which will be asserting the same right that Illinois is already asserting.

Appellees state (p. 18) that the Indiana Gross Income Tax "certainly" will "increase their cost of doing business" but that this is no more than a property tax would

do. Appellant does not object to the increased cost of doing business resulting from the imposition of state taxes on its property, nor from state taxes on its intrastate activities. We have already shown the heavy Indiana Gross Income Taxes which Appellant has paid and which are not involved in this appeal, and most of which were paid without any protest or contest. It is the threat of a multiple tax burden which we protest against, and which is the central issue of this appeal. In Class D, where the buyer gets delivery of his goods in Indiana for the purpose of transporting them to his home in Ohio, Kentucky or Illinois, and does so transport them, Indiana, the state of delivery, has already asserted the right to tax the entire gross receipts. But on the reason given for the decision, the state of the buyer, Ohio, Kentucky or Illinois, can also tax the same entire gross receipts. Class D transactions, therefore, involve the transportation of goods in interstate commerce, and the result of the decision of the Indiana Supreme Court is definitely to raise the threat of multiple taxation.

### **Class C Transactions**

The Appellees contend that in Class C the "only possible interstate or extrastate activity was the formation of the executory contract of sale."

But we have shown that there was continuous intercourse across state lines in order to effect Class C sales, and interstate intercourse ever since *Gibbons v. Ogden*, 9 Wheaton 1, has been held to be interstate commerce.

In the beginning of each Class C sale, the branch at Cincinnati, Louisville or Kankakee receives an order from a buyer in Indiana. The order may either be sent by mail

from the buyer in Indiana to the branch outside, or the order may have been received by a salesman of the International Harvester Company in Indiana and brought by him to the office in Cincinnati, Louisville or Kankakee. The branch manager at Cincinnati, Louisville or Kankakee accepts the order. The branch receives word from the buyer in Indiana that he will take delivery of his own truck at Fort Wayne or his own seeding machine at Richmond. The branch at Cincinnati, Louisville or Kankakee thereupon directs the factory at Fort Wayne or the factory at Richmond to deliver the truck or seeding machine to the buyer in Indiana. The buyer in Indiana pays cash or gives notes or both to the branch at Cincinnati, Louisville or Kankakee. The notes are held by the branch at Cincinnati, Louisville or Kankakee and the principal and interest on the notes are collected there when due. To complete each sale, therefore, and receive the proceeds, there has been repeated activity across state lines.

The Appellees object that the cases cited by us on page 31 of Appellants' brief evidence a development of law "peculiar to that field and are not to be extended beyond the field." (Appellees' brief p. 20.) This statement recalls an observation by Professor Robert C. Brown of Indiana University Law School in an article in Vol. 18 Indiana Law Journal, pp. 77, 82, entitled "Some Legal Aspects of State Sales and Use Taxes," to the effect that "We seem to be approaching, if we have not already reached, that paradise where everything is interstate commerce for purposes of federal regulation (especially labor regulation) and nothing is interstate commerce so far as state taxing power is concerned." We believe that the cases cited on page 31 of our original brief are clearly to the effect that the transmission of telegraph, telephone

and radio messages are transactions in interstate commerce. If they are transactions in interstate commerce, then we see no reason why the transactions in Class C are not transactions in interstate commerce, and consequently we see no reason why the ordinary principles of taxation governing transactions in interstate commerce should not apply.

Certainly, it would seem clear that unless the Class C transaction is given the protection of the Commerce Clause, the way is open in Class C for both the state where the goods are delivered, Indiana, and the state where the contract is made, and the sales proceeds received, Kentucky, Ohio or Illinois, to tax the entire gross receipts without apportionment.

The Indiana Supreme Court has held in this case in Class C sales that Indiana, which is the state of delivery to the buyer and at the same time the state where the buyer lives, can tax the gross receipts. But if, for example, the sale is one made by the Cincinnati branch to a buyer in southeastern Indiana, there is no reason, save for the protection afforded by the commerce clause, why Ohio, the state where the contract is approved and where the sales proceeds are received, cannot also tax the entire gross receipts.

Indeed, the dissenting opinion in the *Adams* case argues that the "receipt of income is a taxable event" (*J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, 330), and the whole basis of the dissent in *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, is that the receipt of income can be taxed by the state in which it is received. In that case the sales were made outside the State of Washington, the goods were delivered to the buyers outside the State

of Washington, the buyers were located outside the State of Washington, but the sales proceeds were received by Gwin, White & Prince, Inc., in the State of Washington. The dissenting opinion contended that the State of Washington should be permitted to tax the gross receipts received in that State.

This is exactly the same situation which would arise if the State of Ohio, in the example given above, should attempt to tax the gross receipts from a Class C sale. Double taxation of the same gross receipts in Class C can be prevented only if the transaction is recognized for what it is, a transaction in interstate commerce.

Appellees assert that the sole cause of the extrastate element in Class C sales was "the Appellants' departmentalization of its business whereby certain Indiana counties were assigned to out of state branches. Cf. *Nelson v. Sears, Roebuck and Co.* (1941), 312 U. S. 359." (Appellees' Brief, p. 20.)

We are not sure we understand what Appellees mean when they speak of "the Appellants' departmentalization of its business." They admit that what they call "departmentalization" was "based on sound economic factors and was not for the purpose of tax evasion." (Appellees' Brief, p. 20.)

In *Nelson v. Sears, Roebuck and Co.*, *supra*, the Court stated (p. 364) that the mail orders from a buyer in Iowa sent to Sears Roebuck's Chicago office were still a part of Sears Roebuck's Iowa business and Sears Roebuck "can not avoid that burden [namely the burden of collecting the use tax] though its business is departmentalized. What ever may be the inspiration for these mail orders, however

they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa." It will be noted that no tax was imposed on Sears Roebuck on these mail order sales completed by shipment in interstate commerce to the retail buyers in Iowa. Sears, Roebuck and Co. was merely made the collection agency of the State of Iowa for the Iowa Use Tax on the consumer buying the goods. But in imposing even that duty the Court stressed the point that Sears, Roebuck had retail stores in Iowa selling to consumers in the same town or district in which the mail order purchasers also lived. In other words, Sears, Roebuck and Co. made retail sales by mail order to Iowa consumers who lived in the same territory that was handled by the local retail stores in Iowa. One consumer in a town would go to a retail store and another consumer in that same town would send a mail order to Chicago. A Sears Roebuck Iowa store was as available to serve the mail order customers as it was to serve those who bought at the store. This was a unitary business and the Court held only that there was no invalid burden on interstate commerce in requiring the seller to collect the use tax owing by the buyer on mail order purchases.

But in Class C the Record shows that International Harvester Company had no wholesale sales outlets whatever in Indiana for handling the territory actually handled by the Cincinnati, Kankakee and Louisville branches. All the wholesale business with purchasers in Indiana, (namely dealers in the territory of the Louisville, Cincinnati and Kankakee branches), was handled by those branches and those branches only. In other words, a purchaser at wholesale in the territory of the Cincinnati branch, for example, did not have a choice between purchasing from the branch

at Cincinnati, or from a branch of the Appellant in Indiana. He could buy only from the Cincinnati branch. (R. 30, 31.)

The Record also shows that the International Harvester Company had only one retail sales outlet under its own management in the entire territory handled by the Louisville, Cincinnati and Kankakee branches, namely, a McCormick-Deering Store at Seymour, Indiana, under the jurisdiction of the Louisville branch, handling the territory in the vicinity of Seymour. (R. 30.) All the other retail business in the territory of the Cincinnati, Louisville and Kankakee branches was handled on orders accepted by those branches, except those retail sales made by independent dealers, which are not involved in Class C sales.

Therefore, there is no question of "departmentalizing" the business so far as Class C sales are concerned. There is merely involved the question of the division of the territory handled by the Company's branches. In other words, there is no departmentalization of business involved in the sales by a branch in one state to a buyer in another state.

Appellees frankly agree that Appellants have not arbitrarily divided the territory handled by their branches. (Appellees' Brief, p. 20.) We believe we have already sufficiently shown that Appellant has not established the trade areas in which its branches operate, but that the trade has made the areas and not the areas the trade.

We have referred in our original brief to the striking testimony of J. L. McCaffrey, Vice President in Charge of Sales of the International Harvester Company, on this point.

We submit, moreover, as we did in our brief opposing Appellees' motion to dismiss this appeal, that it is incon-

sistent for Appellees to argue that Appellants have departmentalized their business in Class C sales when the buyers live in Indiana and not to recognize that the same argument would deny the right to tax Class D sales. In Class D sales the buyer lives outside Indiana and the branch which made the sale is inside Indiana. In Class C sales the buyer is in Indiana and the branch which made the sale is outside Indiana. If it is "departmentalizing" the business in Class C for a branch located outside Indiana to sell to a buyer in Indiana, then it is "departmentalizing" the business in Class D for a branch located in Indiana to make a sale to a buyer located in Ohio, Kentucky or Illinois.

Therefore, the very argument of Appellees that Indiana has a right to tax Class C sales would deny the right of Indiana to collect a tax on Class D sales.

In Class C then, as in Class D, there was a prior contract between the Appellant and the buyer calling for shipment of the purchased article from the factory, branch or transfer warehouse to the buyer. 50% of the sales in Class C in 1935 and 66% in 1936 were wholesale sales, namely sales to dealers operating under annual contracts with the Appellant. (R. 44.) Neither the purchaser at wholesale (the dealer) nor the consumer were casual purchasers. They lived in the territory of the branch making the sale and dealt habitually across state lines with those outside branches. The sales in question were effected by a steady intercourse across state lines. The transactions were in interstate commerce and, as we have shown, if they are not recognized as such and given the protection of the commerce clause, multiple taxation cannot be avoided. If Indiana, the state of delivery of the goods, can tax the entire gross receipts without apportionment, the way is

open for Ohio, Kentucky or Illinois, as the case may be, the state where the contract is approved and the sales proceeds received, also to tax the receipt of the income, the same entire gross receipts, without apportionment.

### Class E Sales

The Appellees argue that the contention advanced by the Appellants on this appeal as to Class E sales was examined at length by this Court in *McGoldrick v. Berwind-White Coal Mining Company*, 309 U. S. 33, and was specifically rejected. But in *McGoldrick v. Berwind-White Coal Mining Company*, *supra*, the Court particularly called attention (p. 43) to the fact that, "Purchases for resale are exempt from the tax and a purchaser who pays the tax and later resells is entitled to a refund." In other words, the tax involved in the *Berwind-White* case was a tax on the buyer at retail (i.e., in effect a use tax), a completely different imposition from the tax involved in the case at bar. It was for this reason, we submit, that the Court in the *Berwind-White* case said (page 58) that "The rationale of the Adams Manufacturing Company case does not call for condemnation of the present tax. Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption."

In our original brief we referred to the ample evidence in the Record that the shipments in Class E were made from outside Indiana to buyers in Indiana, either because the freight was cheaper that way, or because the branch in Indiana did not have the goods on hand when shipment was required, or for both reasons. (R. 33, 62-63, 77, Plaintiffs' Exhibit 5, R. 84, 97.)

John L. McCaffrey, Vice President of International Harvester Company in Charge of Sales, testified that if there were 100 kinds of machines used in a certain territory, the Branch "might have a sample of each of the machines," but "not nearly enough to supply the total demand of that territory." (R. 77.) Appellees in their brief frankly state (p. 21 of Appellees' Brief) that Class E sales "arose when orders were in large amounts of goods which could not economically be carried in stock and where a cheaper freight rate could be obtained by a direct shipment."

The sales in Class E, we submit, were not in all respects, as Appellees say, similar to those in *Graybar Electric Co. v. Curry*, 238 Ala. 116, 189 So. 186, affirmed in 308 U. S. 513. The sales in the *Graybar* case were all at retail. Of the sales in Class E involved in this case, the tax on retail sales in 1935 is only \$16.13. The tax on wholesale sales in 1935 remaining in contest is \$58.56. In 1936 there is no retail tax involved, the wholesale tax remaining in controversy being \$29.72. (R. 46.) In the *Graybar* case, moreover, the Alabama statute required that the retail merchant collect the tax from the buyer. The Indiana Gross Income Tax is a tax on the seller. Finally, in three classes of sales in the *Graybar* case there was no requirement in the contract that shipment should come from outside Alabama, and as to the fourth class, Class A, the Court said that "Evidently this provision as to 'interstate movement' was to preclude, if possible, the imposition of a sales tax on the goods in Alabama." (*Graybar Electric Co. v. Curry*, 189 So. 186, 190.)

We submit that the rule in *Sonneborn Bros. v. Cureton*, 262 U. S. 506, applies to Class E sales in this case. The contract or order of sale called for interstate shipment, the

shipment was so made, either because the goods were not on hand at the Indiana branch or because the freight was cheaper if shipped from the factory or transfer house outside the state direct to the consumer in Indiana, the sales were chiefly wholesale sales to dealers, and finally if Indiana can tax the entire gross receipts in Class E the way is certainly open to the state of manufacture of the goods, which is outside Indiana, also to tax the entire gross receipts without apportionment.

**The Tax on Classes C, D and E would Deny Due Process of Law Under the Fourteenth Amendment**

Appellees in their brief state that the tax is measured "by the volume of such activities as expressed in the gross receipts arising from them within the state," and therefore does not violate the due process clause. But the tax is laid on the entire gross proceeds without apportionment, and those proceeds resulted from all the activities of the taxpayer in producing the gross income.

In *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, and *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, this Court held the tax bad because, as stated in the latter case, it was not "apportioned to its [the taxpayer's] activities within the state" (*Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 439). If the tax is not apportioned to the activities within the state, it follows necessarily that it taxes business and property outside of the State and therefore violates the due process clause. *Hans Rees Sons v. North Carolina*, 283 U. S. 123.

## CONCLUSION

It has been frequently remarked that one of the chief reasons for the splendid commercial development of the United States is that there has been absolute freedom of trade between the States. One of the dominating purposes of the Federal Constitutional Convention was to prevent the restrictions which the States at that time were imposing on interstate trade. Hamilton, Madison and Washington, among others, were greatly distressed by the jealousies of the various States and their selfishness. The States at that time did not operate by taxes imposed on trade between the States, but they operated by actual tariff duties. Madison wrote near the end of his life in his "Preface to Debates in the Convention of 1787" that "the States having ports for foreign commerce, taxed & irritated the adjoining States, trading thro them, as N.Y. Pena. Virga. & S-Carolina. Some of the States, as Connecticut, taxed imports as from Massts. higher than imports even from G.B. of wch. Massts. complained to Virga. and doubtless to other States (see letter of J.M.). In sundry instances, of as N.Y. N.J. Pa. & Maryd. (see ) the navigation laws treated the Citizens of other States as aliens." Farrand's "The Records of the Federal Convention of 1787," Vol. III, p. 548.

George Washington wrote in a letter to David Stuart, July 1, 1787:

"Persuaded I am that the primary cause of all our disorders lies in the different State Governments, and in the tenacity of that power which pervades the whole of their systems. Whilst independent sovereignty is so ardently contended for, whilst the local views of each State and separate

interests by which they are too much govern'd will not yield to a more enlarged scale of politicks; incompatibility in the laws of different States, and disrespect to those of the general government must render the situation of this great Country weak, inefficient, and disgraceful. It has already done so,—almost to the final dissolution of it—weak at home and disregarded abroad is our present condition, and contemptible enough it is."

Farrand's Records of the Federal Convention of 1787. Vol. III, p. 51.

Hamilton in the Federalist, No. XI, page 65, Lodge Edition, declared that "An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions not only for the supply of reciprocal wants at home, but for exportation to foreign markets."

It is surely as much a restraint on trade between the States to impose multiple gross receipts taxes on the proceeds of interstate commerce as to impose tariff duties on the passage of goods from State to State. The Appellants do not ask that no gross receipts taxes on proceeds from interstate commerce be imposed. But they do say that, unless the State statute restricts the tax to the proportion of the gross receipts arising from the activities of the taxpayer within the State, or unless Congress lays down the standards under which taxation of gross receipts from interstate commerce may be imposed, such taxation is forbidden by the commerce clause.

Such a result would not give the Appellant any tax or other competitive advantage over intrastate business. Plaintiffs' Exhibit 2 (R. 71, 94) and Exhibit 3 (R. 73, 95)

show that, broadly speaking, where the Appellant operates in interstate commerce in Indiana, other businesses operate in interstate commerce. On the Traffic World Map (Exhibit 2) and the Department of Commerce Map (Exhibit 3) as on the International Harvester branch house map (Exhibit 1, R. 90, 93), Cincinnati is the center of a trade area extending into Ohio, Kentucky and Indiana. Evansville is the center of a trade area on all three maps, covering parts of Indiana, Illinois and Kentucky. Louisville is the center of a trade area on all three maps, including territory in Indiana and Kentucky. Parts of east central Illinois and west central Indiana are in the same trade area on all three maps.

In short, where the Appellant does an interstate business, other businesses do an interstate business and receive the same protection. Where the Appellant does an intrastate business, other taxpayers do an intrastate business, and have the same burdens and protection. Practically every taxpayer doing a wholesale business would make both interstate and intrastate sales. It is altogether illusory to think that an interstate business would be given an advantage over an intrastate business.

On the other hand, if the transactions in Classes C and D are subjected to the Indiana gross income tax, the Appellant may well actually be put at a competitive disadvantage. A competitor with Indiana branches selling to purchasers in the Class D territory in Ohio, Kentucky and Illinois who shipped the goods by rail to the buyer in Ohio, Kentucky or Illinois would be exempt from the Indiana tax under the decision in the *Adams* case. A competitor with branches in Ohio, Kentucky or Illinois who shipped the goods by rail to buyers in Indiana in the Class C ter-

ritory would be exempt from the Indiana gross income tax under the decision of the Indiana Supreme Court as respects Class A sales in this case. It follows that if the decision of the Indiana Supreme Court here on appeal is affirmed, Appellant will be laid open not only to the danger of multiple taxation on transactions in Classes C, D and E but will also be laid open to taxes in Classes D and C where its competitors shipping by common carrier will not be subject to tax at all.

Respectfully submitted,

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